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No. 03-1405

Supreme Court, U.S.
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In The
Supreme Court of the United States

HOTEL & MOTEL ASSOCIATION
OF OAKLAND, et al.,

Petitioners,

v.

CITY OF OAKLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION RESTATED

Did the Court of Appeals correctly conclude under the due process "void-for-vagueness" standard of *City of Chicago v. Morales*, 527 U.S. 41 (1999) for facial constitutional challenges that a municipal ordinance of the City of Oakland provides sufficient notice to ordinary hotel owners of conduct that it prohibits and provides ample guidance to law enforcement to enforce the ordinance in a non-arbitrary way, and that under the alternative facial constitutional challenge standard of *United States v. Salerno*, 481 U.S. 739, 745 (1987), the ordinance was not unconstitutionally vague in all its applications?

TABLE OF CONTENTS

	Page
QUESTION RESTATED	i
REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED	1
A. The Petition For Certiorari Should Be Denied Because The Record Does Not Fairly Present The Issue For Which Certiorari Is Sought	1
1. The Court Of Appeals Found The City's Ordinance Constitutional Under The *Morales* Standard That Petitioners Contend Should Apply Here	1
2. Petitioners' Claim That The City's Ordinance Is Unconstitutional Under The *Morales* Standard Provides No Proper Basis For Review	4
B. Review Of Portions Of The City's Ordinance Other Than The "Close Proximity" Language Considered By The Court Of Appeals Is Inappropriate	7
C. This Case Is An Inappropriate Vehicle Because There Has Been No State Court Construction Of The Ordinance At Issue Here	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

City of Chicago v. Morales, 527 U.S. 41 (1999)..... *passim*

Cox v. Louisiana, 379 U.S. 559 (1965)..... 3

Grayned v. City of Rockford, 408 U.S. 104 (1972)..... 3, 5

Kolender v. Lawson, 461 U.S. 352 (1983)..... 2, 3

Neil v. Biggers, 409 U.S. 188 (1972)..... 5

Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997)..... 3

Rogers v. U.S., 522 U.S. 252 (1986)..... 2

United States v. Salerno, 481 U.S. 739 (1987)..... 1, 2, 3, 4

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)..... 4, 5, 6

OTHER AUTHORITIES

OMC section 8.03.120(A)..... 7, 8, 9

Rules of the United States Supreme Court, Rule 10..... 5

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition For Certiorari Should Be Denied Because The Record Does Not Fairly Present The Issue For Which Certiorari Is Sought.

Petitioners advance three grounds for review. These are 1) that the Court of Appeals "refused to apply" this Court's decision in *City of Chicago v. Morales*, 527 U.S. 41 (1999) (*Morales*), 2) that the Court of Appeals' decision "implicates" an issue of recurring national importance, namely, "the dispute" that has arisen over "conflicting pronouncements by this Court as to the standard for assessing a facial challenge to the constitutionality of a government enactment" and 3) that the challenged regulations are unconstitutional under *Morales*. None of these grounds is persuasive, because the record does not fairly present those issues.

1. The Court Of Appeals Found The City's Ordinance Constitutional Under The *Morales* Standard That Petitioners Contend Should Apply Here.

Both the first and second grounds for review stated in the petition are premised on the contention that the Court of Appeals applied the standard for facial challenges to statutes set forth in *United States v. Salerno*, 481 U.S. 739, 745 (1987) (*Salerno*) rather than the standard announced in *Morales*. That premise is incorrect.

In *Salerno*, this Court evaluated a facial constitutional challenge on due process grounds to a federal bail statute. The Court stated that to sustain a facial constitutional challenge, "the challenger must establish that no set

of circumstances exists under which the Act would be valid." *Id.*, 481 U.S. at 745. In *Morales*, the Court was presented with a facial constitutional challenge on due process "void-for-vagueness" grounds to a municipal ordinance. A plurality of this Court concluded that the appropriate analysis was the two-part test articulated in *Kolender v. Lawson*, 461 U.S. 352, 357 (1983): "First, [the ordinance] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56, *see also id.* at 64 (conc. opn. of O'Connor, J., joined by Breyer, J.).

While *Salerno* and *Morales* may accurately be said to have engendered discussion in both the courts and the academy, the dispute over their application is of no moment here because the Court of Appeals found the Ordinance constitutional under *both* standards. Petition, Appendix A at 19a-20a. This case thus does not in fact fairly present the issue urged by petitioners, and review is accordingly inappropriate. *Rogers v. U.S.*, 522 U.S. 252, 258-59 (1986) (certiorari improvidently granted where record does not fairly present question Court called to address.)

Petitioners are correct that the Court of Appeals discussed at some length the contrasting standards for facial challenges of municipal laws as articulated in *Salerno* and *Morales*, and concluded that *Salerno* appeared to be the standard still favored by this Court, since it had not been clearly abrogated by *Morales*. Petition, Appendix A at 17a-19a. However, in holding that the City's Ordinance was constitutional, the Court of Appeals in fact applied both standards – *Salerno's* "no set of circumstances" standard, *and* the two-part test initially articulated in

Kolender and adopted by the plurality in *Morales*. This is made clear by the court's statement that "*even if the all or nothing principle [of Salerno] were inapplicable*, the Association's challenge cannot succeed. The Ordinances are simply not vague on their face or in their application." Petition, Appendix A at 19a (emphasis supplied).

Having made that general pronouncement – that under *either* standard, the City's Ordinance was constitutional – the Court of Appeals engaged in a more detailed analysis of the statutes. Specifically, the question decided by the Court was whether the City's Ordinance "provides sufficient notice to ordinary hotel owners of the conduct that is prohibited and gives law enforcement ample guidance to enforce it in a non-arbitrary way." Petition, Appendix A at 19a. This is the *Morales* standard.[1] *See Morales*, 527 U.S. at 56.

Applying the *Morales* standard, the Court of Appeals "had little trouble" concluding that the ordinance passed constitutional muster. Petition, Appendix A at 19a. This was so because "close proximity", the term in the ordinance that petitioners contend is unconstitutionally vague, was an easily understandable term, one that had been found sufficiently clear in several decisions of this Court. *See* Petition, Appendix A at 20a (*citing Grayned v. City of Rockford*, 408 U.S. 104, 111 (1972); *Cox v. Louisiana*, 379

[1] The Court of Appeals cited its prior decision in *Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir. 1997). Petition, Appendix A at 19a. The language from *Nunez* was itself culled from *Kolender*. *Id.* *Kolender*, of course, is the wellspring from which the language and the reasoning of the plurality opinion in *Morales* flows. *See Morales*, 527 U.S. at 56-64.

U.S. 559 (1965)); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). In addition, the Court of Appeals found that "the provision in question provides no less than 19 specific examples of conduct" to which it applied. Petition, Appendix A at 20a. Together, the court concluded, these provisions provided sufficient notice of conduct that is prohibited and operated to adequately constrain arbitrary actions of law enforcement. *Id.*

In summary, the Court of Appeals, while acknowledging a difference of opinion concerning the standard to apply, nevertheless concluded that the City's Ordinance was constitutional under both standards of review – *Salerno and Morales*. Accordingly, neither the purported "refusal" to apply *Morales*, nor any "dispute" as to the proper standard to apply is properly presented in the record, and the petition should be denied.

2. Petitioners' Claim That The City's Ordinance Is Unconstitutional Under The *Morales* Standard Provides No Proper Basis For Review.

As their third basis for review, Petitioners confidently contend that had the Court of Appeals applied the proper standard, it would have reached the "correct" conclusion that the City's Ordinance is unconstitutionally vague. Petition at 22-25. As explained above, and as is abundantly clear in the record, the Court of Appeals did apply what petitioners contend is the proper standard and concluded that the Ordinance was constitutional. The review petitioners seek is thus necessarily based on the proposition that the Court of Appeals, although it had applied the proper standard, should have reached a different result. An erroneous application of law to fact is,

of course, no basis for granting certiorari, and thus this ground should be rejected as well. *See* Rules of the United States Supreme Court, Rule 10.

Moreover, in reaching the conclusion that the City's Ordinance was constitutional, the Court of Appeals affirmed the findings of the district court. Given this procedural posture, what petitioners actually dispute is as much the application of law to fact by the two courts as it is the choice of which legal standard to apply. Once more, then, petitioners present an issue in a posture not amenable to review under the precedents of this Court. Where, as here, the findings that are challenged have been affirmed by two lower courts, this Court "will not overturn lightly" the concurrent findings of the courts below. *Neil v. Biggers*, 409 U.S. 188, 193 fn. 3 (1972). While that "salutary" rule evidently operates with less force where the dispute is as to the constitutional significance of those findings (*id.*), here, there can be no reasonable dispute as to the correctness of the holdings below. This is so because language similar to that at issue in this case has twice been considered by this Court in the context of a facial "void-for-vagueness" challenge, and has twice been found to pass constitutional muster. *See Village of Hoffman Estates v. Flipside*, 455 U.S. at 503; *Grayned v. City of Rockford*, 408 U.S. at 111.

In addition, petitioners' contention that the Ordinance reaches a substantial amount of innocent conduct is misplaced.[2] Petition at 11. That contention is based not on

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[2] Respondent notes that the conduct by Association members that gave rise to the Deemed Approved program was anything but innocent:

> Whereas evidence provided by the community in actions by the City Attorney strongly support the conclusion that the

(Continued on following page)

the standard adopted in *Morales*, but on the classic formulation of the "overbreadth" doctrine. *See, e.g., Village of Hoffman Estates*, 455 U.S. at 495; *Morales*, 527 U.S. at 52. However, as the Court of Appeals recognized, "the Association does not proceed under the overbreadth doctrine." Petition, Appendix A at 17a, fn. 7. Nor could they have, for this Court has applied the "overbreadth" doctrine only to laws restricting First Amendment rights. *See Morales*, 527 U.S. at 52-53 (plur. opn.), 72 (conc. opn. of Breyer, J.), 77, 79 n.2 (dis. opn. of Scalia, J.).

Petitioners' focus on the *mens rea* issue is similarly misplaced. The absence of a *mens rea* requirement is not, as petitioners seem to suggest, independent proof that a statute is unconstitutionally vague. Petition at 24. As this Court stated in *Morales*, if a law involves criminal penalties, lacks a *mens rea* requirement, and implicates constitutionally protected conduct, then it may be unconstitutional "if vagueness permeates the text of the law." *Morales*, 527 U.S. at 55. If those factors are present, as noted several times, the test to be applied under *Morales* is whether the

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> operators of problem properties take minimal action to screen or monitor the activities of their patrons, and allow the open use of the property for drug and prostitution activity all hours of the day and night and . . .
>
> police surveillance undertaken over the past five years shows that prostitution and drug activity at many of the problem sites takes place openly during all hours of the day and night, and in full view of the operators, who take no significant action to curb unlawful activities . . .
>
> there is a correlation between high levels of drug and prostitution activity and the existence of substandard and public nuisance conditions at the problem properties.

Petition, Appendix E at 68a.

statute provides sufficient notice of conduct that may subject citizens to criminal penalties and whether it contains sufficient checks on arbitrary enforcement – the test applied by the Court of Appeals here. *Id.* at 56; Petition, Appendix A at 19a-20a. Accordingly, petitioners' discussion of *mens rea* and its effects on statutory analysis provides no independent basis that might favor a writ of certiorari in this matter.

In conclusion, then, none of the three grounds for review advanced by petitioners is fairly presented in the record, and respondent respectfully urges this Court accordingly to deny the petition.

B. Review Of Portions Of The City's Ordinance Other Than The "Close Proximity" Language Considered By The Court Of Appeals Is Inappropriate.

Petitioners ultimately acknowledge the dispositive fact that the Court of Appeals applied the *Morales* standard, but attempt to downplay its significance, averring that the Court of Appeals' discussion was "limited" to the Ordinance's "close proximity" language. Petition at 22-23. It is not surprising that the Court's discussion was limited to that language. Review of the decisions of the district court and the Court of Appeals reveal that, although repeatedly admonished to provide specific facts and arguments to support their "vagueness" arguments, petitioners were ultimately able to point only to the "close proximity" language contained in OMC section 8.03.120(A). Thus, the "close proximity" language was the only provision that petitioners specifically challenged and actually presented to the Court of Appeals for its review.

The decision of the district court is instructive in this regard:

> It is nearly impossible to glean from the First Amended Complaint just which provisions of the ordinances plaintiffs allege are unconstitutionally vague. The complaint makes minor reference to the lack of definition of the terms "transient" or "occupancy." In their opposition brief, Plaintiffs provide some further specificity, arguing that the ordinances fail to define what "close proximity
> to the property" means, what constitutes "lewd conduct" and how far from their properties is an "adjacent public sidewalk." Plaintiffs also incorporate into their argument the "additional vagueness claims" which "have been specifically delineated in the complaint" and they chastise defendants for failing to "specifically address" these allegations. Plaintiffs are living in a glass house. The complaint is anything but specific, and it must be at least as challenging for defendants to decipher plaintiffs' disorganized and disjointed claims as it is for the Court.

Petition, Appendix B at 37a.

The district court then concluded that the terms "close proximity" and "adjacent sidewalk" were sufficiently clear as to provide a person of ordinary intelligence fair notice that his conduct, or contemplated conduct was prohibited by law. Petition, Appendix B at 40a.

On appeal, the record is equally clear: the only provision presented to the Court of Appeals as unduly vague was the "close proximity to the property" language of OMC section 8.03.120(A). Petition, Appendix A at 20a.

Seen, then, in its proper context, petitioners are asking this Court to review the question of how the Court of Appeals *might* have ruled had it been presented with the argument that never-identified provisions of the Ordinances were unconstitutionally vague. Those hypothetical questions present no basis for review by this Court.

Faced with the fact that the Court of Appeals did apply the standard set forth in the *Morales* plurality to the only provision presented to it that petitioners claimed was vague, petitioners now argue that the decision must be reviewed because the City's Ordinance imposes an obligation on motel owners to police for nuisances. Petition at 2, 4-5, 11.

As an initial matter, there is no merit to their assertion that the Ordinance requires them to "police" for nuisances of which they may be unaware. The challenged provision on its face only requires petitioners to maintain their properties so that they neither constitute a nuisance, nor contribute to the proliferation of nuisance activities. Petition, Appendix E at 62a (OMC section 8.03.120). Thus any violation of the Ordinance that might result in a criminal penalty necessarily must be based on conduct emanating from petitioners' own properties, for which they cannot claim ignorance.

More fundamentally, these grounds present an improper basis for review, because petitioners never presented the issue to the Court of Appeals. The closest petitioners came to raising the question was before the district court, where they claimed they should be subject to criminal penalties for only nuisances that occur on their property, and not for those that occur in proximity to their

properties. The district court correctly characterized that allegation as a substantive claim that was irrelevant to the question of whether the Ordinance was vague. Petition, Appendix C at 37a, fn. 8. That was as far as the question went; it played no part in petitioners' appeal. Petition, Appendix A, *passim*. Here, again, petitioners urge review based on an issue that was not before the Court of Appeals, and their petition must be denied on that basis as well.

C. This Case Is An Inappropriate Vehicle Because There Has Been No State Court Construction Of The Ordinance At Issue Here.

A due process "void-for-vagueness" challenge to a *state* statute like the City's Ordinance here can turn on whether the state's courts have adopted a limiting construction of the challenged statute. *Morales*, 527 U.S. at 61 & n.31 (opn. of the Court), 65, 68 (conc. opn. of O'Connor, J.), 73 (conc. opn. of Breyer, J.). *Morales*, for example was a due process challenge to a municipal ordinance raised initially in state court by the petitioners as a defense to their criminal prosecutions. In deciding their challenge, this Court looked to and relied on the authoritative construction the ordinance had received from the state's highest court. *Morales*, 527 U.S. at 61 (opn. of the Court), 65 (conc. opn. of O'Connor, J.).

Here, by contrast, this case is not a state court enforcement action against petitioners, and there have been no reported state court decisions construing the ordinance as applied to petitioners or others. Instead, petitioners brought this as a federal court section 1983 action in which they are the plaintiffs. The absence of any state court construction of the City's Ordinance raises additional

barriers of prudence, federalism, and comity that strongly counsel against this Court using this case as the vehicle for deciding important questions regarding facial constitutional challenges on due process "void-for-vagueness" grounds, and provides yet another reason for denying the petition.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 10, 2004

Respectfully submitted,

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